91-69

Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ALAN BAILEY,
Petitioner,

v.

CITY OF NATIONAL CITY, CITY COUNCIL OF THE CITY OF NATIONAL CITY,
Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

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July 1, 1991

QUESTIONS PRESENTED

1. Whether a person lacks standing under the First Amendment of the United States Constitution to challenge a local regulation that prohibits on its face intimate associations.

2. Whether a local government regulation that provides:

> Employees shall avoid continuous associations or dealings with persons who they know or should reasonably suspect are racketeers, sexual offenders, felons, suspected felons, persons under criminal investigation or indictment, or who have a reputation in the community for present felonious involvement or criminal behavior, except as necessary in the performance of official duties"

is overbroad.

3. Whether a local government regulation as set forth in Question #2 is unconstitutionally vague as applied to petitioner.

4. Whether a local regulation as set forth in Question #2 impermissibly prohibits expressive associations as protected by the First Amendment to the United States Constitution.*

*Alan Bailey was the plaintiff in the Superior Court of San Diego County, California and appellant in the Court of Appeals of the State of California. The following were respondents in the Superior Court of San Diego County, California and the Court of Appeals of the State of California: City of National City and City Council of the City of National City.

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**PETITION FOR A WRIT OF CERTIORARI
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The petitioner, Alan Bailey, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal for the Fourth Appellate District, State of California, entered in the above proceeding on January 16, 1991. The petition for review to the California Supreme Court was denied on April 11, 1991.

OPINIONS BELOW

The opinion of the Court of Appeal for the Fourth Appellate District is reported at 226 Cal.App.3d 1319 (1991),

_____, and is set forth in Appendix A ("App. A") to this petition at 1a-17a. The judgment of the Superior Court of California, San Diego County, is set forth in Appendix B ("App. B") to this petition at 1b-2b.

JURISDICTION

The decision of the Court of Appeal for the State of California was entered on January 16, 1991. A timely petition for review was filed with the Supreme Court of the State of California. An order denying the petition for review is set forth in Appendix C ("App. C") to this petition at 1c, was entered on April 11, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTES INVOLVED

This case involves the First and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF THE CASE

The petitioner was employed as a full-time police officer with the City of National City, California. The petitioner was terminated from his employment after being accused of violating several Police Department regulations. Included within the alleged rule violations was an allegation that petitioner violated Rule 3.3 of the Police Department Rules and Procedures.[1]

The petitioner appealed his termination to the National City Civil Service Commission and requested an evidentiary

[1]Employees shall avoid continuous associations or dealings with persons who they know or should reasonably suspect are racketeers, sexual offenders, felons, suspected felons, persons under criminal investigation or indictment or who have a reputation in the community for present felonious involvement or criminal behavior, except as necessary in the performance of official duties.

hearing. After a hearing lasting several days, the Civil Service Commission made a finding that the petitioner violated four National City Police Department policies, but recommended the imposition of a suspension from duty rather than termination from employment. Both the Police Department and the petitioner appealed the Civil Service finding to the City Council. The City Council reversed the Civil Service Commission and upheld the original termination of the petitioner.

The most serious accusation against the petitioner was an allegation concerning petitioner's continued contacts with an old friend (who had been convicted of a felony), thus violating Rule 3.3 (App. A, p. 2a), which prohibits continuous personal association with felons. The petitioner, Alan Bailey, and a former police officer, Eddie Smith, were very close personal friends. In October 1987, Smith suffered a conviction for felony solicitation. App. A, p. 5a. In November 1987, the petitioner wrote a letter to the sentencing judge in support of his friend Eddie Smith urging the court to grant probation rather than imposing a prison term. App. A, p. 5a.

Upon learning of this communication to the trial judge sentencing Eddie Smith in December 1987, Sgt. Darton of the National City Police Department met with the petitioner to discuss his continued association with Eddie Smith. App. A, p. 6a. During that meeting, Sgt. Darton advised petitioner to disassociate himself from Smith because Smith was a convicted felon. App. A, p. 6a. After this meeting, petitioner had at least one meeting and one telephone conversation with Smith between December 1987 and July 1988. App. A, p. 6a. The first contact was a business lunch to discuss a real estate loan for petitioner's parents and also to discuss a possible loan for petitioner to purchase a residence. App. A, p. 6a. The meeting was attended by the owner of a mortgage company, Eddie Smith (a convicted felon) and petitioner Alan Bailey. The only other contact the petitioner had with Eddie Smith was phone calls in May 1988. App. A, p. 7a. Smith's wife had been arrested by an officer of the National City Police Department and Eddie Smith called upon petitioner

to act as liaison between Eddie Smith and the National City police officer. Petitioner contacted the arresting National City police officer and gave the officer Eddie Smith's home telephone number. App. A, p. 7a.

During the Civil Service hearing, petitioner still considered Eddie Smith to be a close personal friend. App. A, p. 7a.

After the National City Civil Council overturned the decision of the Civil Service commission and reinstated the termination from employment, petitioner filed a petition for writ of mandamus in the Superior Court, County of San Diego, State of California. The Superior Court denied the petition for writ of mandamus and found that "National City Police Department Rule 3.3 is constitutional as it was applied in this case." App. B, p. 1b. The petitioner filed a timely appeal with the Court of Appeal, Fourth Appellate District, Division One, of the State of California. The Court of Appeal issued its decision January 16, 1991. App. A.

The Court of Appeal found that the petitioner lacked standing to challenge the overbreadth of the National City Regulation 3.3 finding that there are two different forms of "freedom of association, which may enjoy constitutional protection, only one of which falls within the ambit of the First Amendment." App. A, p. 15a. The Court of Appeal relied on *Hvamstad v. Suhler* (D.Minn. 1989) 727 F. Supp. 511, in concluding:

> Given the limited scope of the overbreadth doctrine in the Supreme Court's analysis of foundations of the freedom of association, this court concludes that one cannot launch an overbreadth attack based upon the freedom of intimate association. . . . The overbreadth doctrine, in its limited state, cannot . . . be extended to encompass intimate association rights that are based not on First Amendment concepts, but on general liberty notions. App. A, p. 16a.

The Court also found that National City Regulation 3.3 did not on its face single out expressive associations for regulation, rather it is limited to regulating only intimate

associations. App. A, p. 16a. Since the regulation in the Court of Appeals opinion did not attack an expressive association, First Amendment scrutiny was not applicable to Rule 3.3 merely because the rule would conceivably burden activity sheltered by the First Amendment. App. A, p. 17a.

The Court of Appeal specifically disapproved of the findings in *Dunn v. McKinney* (DC Wyo. 1985) 622 F.Supp. 259 and *Sponick v. Detroit Police Department* 49 Mich.App.162 211 NW 2d 674. App. A, p. 17a.

The petitioner filed a timely Petition for Review with the Supreme Court of the State of California. The Supreme Court of the State of California refused to hear the Petition for Review on April 11, 1991.

REASONS FOR GRANTING THE WRIT

I

PETITIONER HAD A RIGHT TO COMPLAIN THAT A REGULATION WAS OVERBROAD BASED ON REGULATION OF AN INTIMATE RELATIONSHIP

The decision of the Court of Appeal of the State of California has determined that a regulation which protects intimate associations, including family relationships, are not protected by the First Amendment. The United States Supreme Court has never ruled on the precise issue of whether an intimate association gives a person standing to challenge an overbroad statute or whether family or close relationships are protected by the First Amendment's right of association. The Supreme Court has referred to constitutionally protected freedom of association in two distinct senses. *Roberts v. United States Jaycees* (1984) 468 U.S. 609, 617-618 discusses the line of decisions referring to two different types of freedom of association. In one line of decisions, the Court concluded that choices to enter into and maintain intimate human relationships must be secured against undue intrusion by

the state, referring to such freedom as central to our constitutional scheme. In another line of decisions, the Court has recognized the right to association for the purpose of engaging in those activities protected by the First Amendment — speech, assembly, petition for redress of grievances and the exercise of religion. The *Roberts* court observed that expressive and intimate association rights may coincide, especially where the state interferes with the individual selection of those with whom they wish to join in a common endeavor. *Id.* at p. 618.

The court in *Hvamstad v. Suhler* (D.Minn. 1989) 727 F. Supp. 511 ruled that some intimate associations are not found within the First Amendment, thereby denying a petitioner standing to challenge an overbroad statute based on intimate associations. The court, however, failed to firmly establish what type of intimate relationships could receive constitutional protection.

The federal courts of appeal have disagreed on the question of standing based on expressive versus intimate associational rights. In addition to *Hvamstad v. Suhler, supra*, the court in *IDK, Inc. v. Clark County* (9th Cir. 1988) 836 F.2d 1185, declined to extend the overbreadth exception to deter future restrictions on intimate associational rights. The opinion does not explain why the exception is only applicable to expressive associational rights, other than to note the distinction in the fact that the exception traditionally evolved in a First Amendment setting.

In *Wilson v. Taylor* (1984) 733 F.2d 1539, the court found that the First Amendment protected a police officer's right to date the daughter of a convicted felon and a reputed mobster. A subsequent decision of the Ninth Circuit, *Trujillo v. Board of County Commissioners* (1985) 768 F.2d 1186, suggested that *Wilson* case really dealt with the freedom of intimate association under the Fourteenth Amendment, the substance of the *Wilson* decision which protects that relationship still stands.

Rule 3.3 of the National City Police Department procedures prohibits all relationships, including family relationships, with

persons suspected of criminal activity or convicted felons. The Court of Appeal of the State of California ruled that the petitioner failed to establish standing since his relationship was with a close friend and such a relationship does not deserve constitutional protection under the *Hvamstad* decision. The Court of Appeal of the State of California relied heavily upon the Court's decision in *Roberts v. United States Jaycees* (1984) 468 U.S. 609, 82 Lawyer's Edition 462, 104 S.Ct. 3244. The Court of Appeal emphasized that the "freedom of association" is protected by the United States Constitution in different ways. App. A, p. 15a. The court said that "intimate associational rights" was not regarded in *Roberts* as being a product of the First Amendment. Instead, it received constitutional protection "as a fundamental element of personal liberty." *Roberts, supra,* at 617-618. The Court of Appeal of the State of California then determined that the court in *Roberts* had determined that only expressive associational rights, wherein people collectively associated "for the purpose of engaging in those activities protected by the First Amendment — speech, assembly, petition for redress of grievances and the exercise of religion . . ." *Ibid,.* were derived from the First Amendment. Based on this observation, the Court of Appeal of the State of California determined that Petitioner lacked standing to challenge a facially overbroad regulation.

As noted in *Broadrick v. Oklahoma* (1973) 413 U.S. 601, 37 Lawyer's Ed. 2d 830, 93 S.Ct. 2908, a special exception was created for a person to challenge an overbroad statute when the right of association was infringed giving a person the right to challenge the overbreadth of the regulation even though his specific conduct could be lawfully regulated. Even though the United States Supreme Court has had ample opportunity, it has not held that this exception should not also be available to protect the extremely valued intimate associations so as to avoid a chilling effect on the future exercise of those rights. It is illogical to not give intimate associational rights the same protection as the expressive associational rights in the context of overbreadth claims to

be made by persons not directly affected in order to prevent others from being deterred from exercising these rights in the future. For example, the right to be able to marry someone special seems to be worthy of at least the same degree of protection as the right to express unpopular views or to engage in the free exercise of religion.

The court, subsequent to the *Roberts v. United States Jaycees* (1984) 48 U.S. 609, decision emphasized the importance of intimate personal relationships in the *Board of Directors of Rotary International v. Rotary Club of Duarte* (1987) 481 U.S. 537, 95 Lawyer's Edition 2d 474, 107 S.Ct. 1940, by stating (at 95 Lawyer's Edition 2d 484):

> Of course, we have not held that constitutional protection is restricted to relationships among family members. We have emphasized that the First Amendment protects those relationships, including family relationships, that presuppose deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs, but also distinctively personal aspects of one's life.

It is likely that virtually every local, state and federal law enforcement agency has a similar rule or regulation prohibiting the association with either felons or persons suspected of criminal activity. A decision of the United States Supreme Court would clarify this very important issue and would have an impact on virtually every police organization in the United States.

If the Court of Appeal decision were to stand, all litigants claiming standing under overbreadth doctrine would be barred if the Court were to analyze that their particular relationship and their particular fact pattern fit within the family or intimate association context. This essentially would make the overbreadth doctrine meaningless and no longer available to challenge regulations that have a chilling effect upon the right of association when an intimate or family relationship was involved.

II

THE LOCAL REGULATION WAS OVERBROAD AS APPLIED

The trial and appellate court found that the regulation was not overbroad as applied to Petitioner. The petitioner was informed that he could have casual contact with a person known as Eddie Smith, who was a former police officer recently convicted of a felony. In fact, Petitioner was told that he could have contact with Smith, but was prohibited from being Smith's "buddy or partying with him." App. A, p. 4a. The petitioner was given no other guidance and was expected to conform his conduct based on the regulation and clarification given by his supervisor. The Police Department placed a subjective evaluation on conduct that was quite trivial in nature. The petitioner had one or two telephone calls and one business luncheon with Eddie Smith. App. A, p. 4a. This conduct was interpreted to violate the regulation apparently either of "partying" or being a "buddy" of Eddie Smith. Petitioner contends the regulation against "continuous association" is void as impermissibly vague because "men of common intelligence must necessarily guess at its meaning." *Connally v. General Construction Co.* (1926) 269 U.S. 385, 391. A person whose conduct is to be regulated has a right to reasonable warning of what conduct must be avoided. Laws must contain defined standards so that the persons charged with enforcement are precluded from ad hoc, subjective interpretation of the regulation *Hoffman Estates v. Flipside, Hoffman Estates* (1982) 455 U.S. 489, 498.

The Court of Appeals decision requires a police officer to not only understand a regulation which prohibits "continuous associations" with persons convicted of a felony or involved in "criminal activity," but further requires them to proscribe their conduct to comply with vague instructions which prohibit the police officer from "partying" or being a "buddy" with a particular person.

III

PETITIONER HAD STANDING TO COMPLAIN THAT THE REGULATION WAS OVERBROAD IN THAT IT REGULATED EXPRESSIVE ASSOCIATIONS

The Court of Appeal also found that National City Policy 3.3 did not restrict "expressive associations." Any regulation prohibiting conduct with certain classes of people (people suspected of criminal activity or felons) clearly restricts associations that were expressive in nature. This regulation effectively prohibits involvement in religious organizations which have members who are convicted felons or suspected of criminal activity or political actions groups that happen to have as a member a person convicted of a felony or suspected of criminal activity.

The regulation on its face was not limited to intimate associations as pointed out by the Court of Appeal. App. A, p. 16a. The regulation regulates all associations with specified individuals whether expressive or intimate.

CONCLUSION

For the reasons stated above, a Writ of Certiorari should be granted to review the decision of the Court of Appeal, State of California.

Respectfully submitted,

Dated: June 7, 1991

EVERETT L. BOBBITT,
Attorney for Petitioner

CERTIFIED FOR PARTIAL PUBLICATION[1]

COURT OF APPEAL, FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

ALAN BAILEY,	)	
	)	
Appellant,	)	
	)	
v.	)	D011272
	)	
CITY OF NATIONAL CITY et al.,	)	
	)	
Respondents.	)	(Super. Ct. No. 609796)
	)	

APPEAL from a judgment of the Superior Court of San Diego County, Robert C. Thaxton, Jr., Judge. Affirmed.

Everett L. Bobbitt for appellant.

Everett L. Bobbitt, counsel for amicus curiae on behalf of appellant.

Christopher L. Ashcraft, counsel for amicus curiae on behalf of appellant.

George H. Eiser, III, City Attorney, and Linda Kaye Harter, Assistant City Attorney, City of National City, for respondents.

Alan Bailey appeals from a judgment denying his petition for a writ of mandamus. Bailey, a police officer with respondent City of National City, was terminated based on his alleged violations of the City's Police Department Rules and Regulations[2]. Bailey petitioned the superior court for a writ of mandamus, contending the action of the city council

1. Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of parts II.A and III.

2. All rule references are to the City's Police Department Rules and Regulations.

in upholding his termination was an abuse of discretion and was unsupported by the evidence. Bailey also contended that rule 3.3, one of the rules he was found to have violated, could not be relied upon because it was unconstitutionally vague and overbroad.

After reviewing the transcripts and evidence from the administrative hearing, the trial court exercised its own independent judgment and concluded the findings by the city council were clearly supported by the evidence. It further determined the city council's action to terminate Bailey was not an abuse of discretion. Additionally, it found rule 3.3 was constitutional as applied in this case.

We find there is substantial evidence to support the trial court's independent judgment that termination was not an abuse of discretion on the facts of this case. We also conclude there is no constitutional infirmity in placing partial reliance upon Bailey's violation of rule 3.3 to support the termination.

I. Summary of Background

Bailey was accused by the City of violating several police department rules. The first alleged transgression was that he undertook outside employment (assisting a civil attorney in accident reconstruction) without obtaining the requisite prior permission from the department. A second rule violation occurred when he testified at the civil arbitration hearing wearing his police uniform, in violation of a rule precluding an officer from using the visible indicators of his official position for personal financial gain. Bailey's most serious rule violation occurred when he continued to have contacts with an old friend (who had been convicted of a felony) after being warned not to do so, thus violating rule 3.3 which prohibited continuous personal associations with felons.

After an administrative investigation confirmed these accusations, the City notified Bailey of its intent to termination his employment. Bailey requested and was granted a *Skelly* hearing[3], which was held before a reviewing officer, who found termination for the various rule violations to be proper.

Bailey then appealed to the City Civil Service Commission. After a hearing lasting several days, the Commission found Bailey had violated four separate rules, but recommended the imposition of penalties other than termination — suspension, reduction in salary step, and repayment by Bailey of certain vacation benefits he had received.

Both Bailey and the policy department appealed the Civil Service Commission's decision to the city council. The city council reviewed the testimony, exhibits and record and issued its determination in the form of Resolution No. 15,844. The resolution made a series of factual findings and concluded therefrom that violation by Bailey of four different police department rules had been established. Because the city council found the nature and gravity of the violations were substantial, it concluded that imposition of the most serious discipline was appropriate and ordered reinstatement of Bailey's termination.

We review the trial court's affirmance of this action by using the "substantial evidence" test as to the factual findings and the "abuse of discretion" test as to the determination that the gravity of the violations supported the remedy of termination.[4]

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3. *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194.

4. The scope of review of disciplinary proceedings varies depending upon the level of review. Findings of fact made by the administrative agency are subject to the independent judgment test when reviewed by a trial court, while trial court review of the discipline imposed is based on the abuse of discretion standard. The latter rule derives from the concept that the trial court is not free to substitute its opinion for that of the administrative body as to an appropriate disciplinary measure. *(Schmitt v. City of Rialto* (1985) 164 Cal.App.3d 494, 500-502.)

On appeal, the trial court's determination of factual matters must be affirmed if it is supported by substantial evidence. (*Lewin v. St. Joseph Hospital of Orange* (1978) 82 Cal.App.3d 368, 386-387.) The appellate court's review of the degree of discipline imposed, however, remains the same as that appropriate to the trial court: The discipline imposed will not be disturbed unless it is shown to have been a manifest abuse of discretion. (*Schmitt v. City of Rialto* (1985) 164 Cal.App.3d 494, 500-502.)

II. There Is Substantial Evidence to Support the Factual Findings Upon Which the Disciplinary Action Was Based

A. Outside Employment

We first review the finding of rule violation based upon the undertaking, without prior permission, of outside employment.

The evidence amply supports the factual findings that Bailey willfully and knowingly violated this rule. Bailey admitted receiving a copy of the rules when he was hired, along with updates as they were distributed. One of the rules prohibits officers from undertaking outside employment without first securing permission. Notwithstanding this rule, Bailey was hired in July 1987 by a private attorney to complete an accident reconstruction, and was further employed to testify regarding that reconstruction during an arbitration hearing, all without his seeking or obtaining permission.

Moreover, when he testified at the arbitration hearing he wore his police uniform, admittedly to bolster the credibility of his testimony. This evidence amply supports the finding Bailey willfully violated the rule precluding an officer from using the visible indicators of his official position for personal financial gain.

Despite being counseled in December 1987 for violating various rules, including the outside employment rules, Bailey again, without seeking permission, undertook outside employment (with a financial services organization) beginning in February 1988. Bailey initially claimed he did not seek permission because then Chief Hart was going through "some difficult times," but subsequently reiterated his fall-back excuse that he though permission was only required for "conflicting" employment. However, even after another officer (engaged in the same activity) advised Bailey in March or April 1988 he should seek permission, Bailey chose not to approach anyone for permission. Instead, it was not until *after* the start of the administrative investigation

concerning his rule violations that he finally "sought permission" for this outside employment. The finding that Bailey willfully and repeatedly violated the rules against outside employment is well supported.

B. Associating with a Felon

Rule 3.3 prohibits police officers from continuous personal associations with felons other than as required to perform their official duties.[5] The Civil Service Commission, the city council and trial court all found, as a factual matter, Bailey violated this rule along with rule 1.6 (requiring obedience to lawful orders) by continuing his association with one Eddie Smith, despite knowing Smith was a felon and despite a specific order to cease associating with Smith. While Bailey claims these findings are "totally unsupported by the evidence," we conclude the evidence, along with all permissible inferences drawn in favor of the trial court's judgment (see *Richardson v. Board of Supervisors* (1988) 203 Cal.App.3d 486, 492-493), supports the findings.

Bailey and Smith were close personal friends. Smith had introduced Bailey to the attorney who hired Bailey for the accident reconstruction testimony referred to above; Smith had been best man at Bailey's wedding in July 1987; and indeed, Smith had given Bailey money to help pay for that wedding. In October 1987, Smith suffered a conviction for felony solicitation. In November 1987, Bailey wrote a letter to the sentencing judge (using police department letterhead and signing the letter in his official capacity) in support of his friend, urging the court to grant probation rather than impose a prison term.

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5. Rule 3.3 provides: "*Personal Associations.* Employees shall avoid continuous associations or dealings with persons who they know or should reasonably suspect are racketeers, sexual offenders, felons, suspected felons, persons under criminal investigation or indictment, or who have a reputation in the community for present felonious involvement or criminal behavior, except as necessary in the performance of official duties."

When the police department learned of this letter in December 1987, Sergeant Darton met with Bailey to discuss the improprieties of his conduct and to review and discuss the various rules Bailey had violated. During that meeting Darton ordered Bailey to disassociate himself from Smith because Smith was a convicted felon. Although Bailey expressed his belief Smith was not a felon, but had instead suffered only a misdemeanor conviction, Darton reiterated (after confirming the facts with others) that Smith was in fact convicted of a felony.

Despite both rule 3.3 and Darton's order, Bailey maintained his friendship with Smith. During the hearings Bailey admitted to only one meeting and one phone call with Smith between the December counseling session and the start of the administrative investigation in July 1988. However, these incidents could be, and apparently were, viewed by the triers of fact as symptomatic of a broader ongoing relationship, since all the triers of fact concluded Bailey had continued his association with Smith.

The first admitted contact was a "business" lunch, at which Bailey met with a Mr. Gardella (the owner of a mortgage company) and Smith (a loan officer with the company) to discuss a loan for Bailey's parents, and also to discuss a possible loan for Bailey to purchase a home. The meeting was of an unusual nature in that it was held to discuss a loan for persons *not even present* (i.e., Bailey's parents); it was attended by the owner of the mortgage company, whose personal presence seems superfluous to a routine loan transaction unless it was to permit Smith to "lobby" on behalf of his friend, Bailey; and it was a luncheon meeting, an informal setting more conducive to such "lobbying" activity than to a routine examination of the financial data on which normal lending decisions turn. A trier of fact could well infer such a meeting exemplified Bailey's ongoing relationship with Smith and Bailey's attempt to capitalize upon it.

The only other contact to which Bailey admitted was a series of phone calls sometime in late May. Smith's wife had been arrested by an Officer Silva of the National City Police

Department, and Smith called upon Bailey to act as liaison between Smith and Silva. Smith called Bailey at home late one night, explaining his wife had been cited and released. He asked Bailey to contact Silva and give Silva the phone number of the Smiths, who wished to talk to Silva. Bailey took steps to help his friend by immediately contacting Silva in the field (via a message relayed through the police dispatcher), and telling Silva that Smith wanted Silva to call him. When Silva told Bailey he could not call Smith because he had no money for the pay phone, Bailey immediately arranged for Smith to call Silva at the phone booth. As a result of those contacts, Silva met with Smith and gave Smith a copy of a police report of the incident, an action for which Silva later was reprimanded. The trier of fact could infer Smith had used Bailey as a liaison, rather than contacting Silva directly, because Smith could rely on Bailey for help, based on their ongoing personal relationship.

In addition to the specifically provable contacts, the general tenor of Bailey's comments fortified the conclusion that he had not severed his relationship with Smith. During the administrative investigation Bailey was interviewed by Captain Short on July 1, 1988. Bailey told Short, in essence, he still considered Smith to be his friend; it was his opinion Smith was not a felon; he and Smith had had several contacts; and he had continued his relationship with Smith. Short testified that Bailey's characterization of his relationship with Smith as continued friendship, his actual contacts with Smith and his wife, and Bailey's opinion that Smith was not a felon despite Darton's information, reflected Bailey's intention of relying on his own information and judgment as to whether or not he would terminate his association. Indeed, even at the Civil Service hearings three months later Bailey considered Smith to be his friend during the relevant period, indicating he still respected Smith and stating "basically, my opinion about Eddie Smith is he's made some mistakes in his life and I think he's paid for it."

The tenor of these statements, both to Captain Short and at the hearing, reflected Bailey's reluctance to accept the

fact that Smith was a felon with whom he could not associate. Their prior close personal relationship, and the contacts between Bailey and both Smith and his wife notwithstanding Darton's December 1987 directive, provide substantial evidence to support the factual conclusion that Bailey continued his association with Smith.

II. The Discipline Imposed Was Not an Abuse of Discretion

Bailey next argues the level of discipline was too harsh. In determining the propriety of the degree of discipline, we must consider the extent to which the conduct actually harmed (or if repeated would be likely to harm) the public service, the likelihood of a recurrence, and the circumstances surrounding the misconduct. (*Skelly v. State Personnel Bd., supra*, 15 Cal.3d at p. 218.) We may not overturn an administrative penalty unless it is grossly excessive or a manifest abuse of discretion. (*Richardson v. Board of Supervisors, supra*, 203 Cal.App.3d at p. 494).

While dismissal of an employee is a drastic remedy, we cannot conclude it was grossly excessive in this case. The unique position occupied by police officers in our society, and the paramilitary nature of such profession, require that police officers be held to a higher standard of conduct and discipline than other employees. (*Kelley v. Johnson* (1976) 425 U.S. 238.) It cannot be gainsaid that the rules violated here are rational limitations on a police officer's freedoms. (See generally, *Unruh v. City Council* (1978) 78 Cal.App.3d 18, 24-25.) Associating with felons can bring disrepute upon an officer by tempting him to yield in his duty to impartially enforce the law, or by conveying the impression law enforcement might not be evenhanded. (See, e.g., *Sponick v. City of Detroit Police Department* (1973) 49 Mich.App. 162, 211 N.W. 2d 674, disapproved on other grounds in *Rinaldi v. Civil Serv. Com'n, City of Livonia* (1976) 69 Mich.App.58, 244 N.W.2d 609.) The prohibition on outside employment is also valid, since time devoted to such employment could sap the officer's energies, impairing his

judgment and reflexes. Those persons to whom society has entrusted the use of deadly force in order to protect its members in quickly unfolding, and often life-threatening, situations may reasonably be expected to devote undiluted attention to their position. Finally, an officer's use of his special status for his own gain is a breach of the public trust and can harm the image of impartial integrity which is the stock-in-trade of a police department.

More important than the individual rule violations, however, is the attitude of disregard for rules and direct orders evidenced by Bailey's repeated rule violations, as well as the harm to discipline and command structures which such conduct and attitude could cause. Bailey's generally good record was flawed by a deficiency in one major area — disciplinary matters. In the prior year the evaluation of Bailey specifically noted he tended to overreact to or criticize disciplinary proceedings against fellow officers, which subverted or disrupted investigations. Even after Bailey was counseled for rule violations and ordered to cease associating with a specific felon, he apparently failed to accept the fact that his friend was a felon, instead persisting in his own interpretation of Smith's status, based on "conflicting information." He continued a relationship in which both he and Smith felt free to call upon each other's good officers for assistance, which in practice resulted in another officer (Silva) receiving a reprimand. Moreover, Bailey undertook new outside employment, again without seeking permission, based on his own interpretation that the rules only proscribed outside employment which "conflicted" with police department employment.

The harm to a police department by an officer who deliberately disregards rules of conduct even after counseling, and associates with felons in willful disobedience of direct orders from his superiors, is multifaceted. The public may question the integrity of a police force whose officers do not adhere to internal rules. Also, the appearance of impropriety when officers associate with felons may harm the force's public image. The command structure and internal

discipline necessary to an effective paramilitary organization would deteriorate if each individual officer were permitted to exempt himself from rules and orders, based on his own interpretation as to their applicability. The actual or potential harm to the public service agency from the misconduct (*Skelly v. State Personnel Bd., supra*, (1975) 15 Cal.3d at p. 218) appears clear, and the circumstances surrounding the misconduct permit the conclusion it was sufficiently likely to recur (*ibid.*), since Bailey declined to follow even specific and direct orders.

Whether termination was the proper degree of discipline for Bailey is at best a question on which reasonable people could differ. We cannot conclude, therefore, that termination was so grossly excessive under these facts as to constitute an abuse of discretion. (*Cadilla v. Board of Medical Examiners* (1972) 26 Cal.App.3d 961, 968.) As explained by Chief Fowler, Bailey was terminated for his "disregard, the ignoring of supervisor's instructions and rules and regulations and standards [being] the common thread, from one incident to the other incident. . . . [T]he common thread ran through all of them, that is, I'll do what I want to do and disregard what the department has told me to do." At bottom, Fowler explained, "It comes down to a matter of trust, as to whether or not you could trust that officer on his own to obey the rules and regulations of the department as well as the instructions of his supervisors." Because there is sufficient evidence Bailey failed this litmus test, we cannot deem termination a manifest abuse of discretion.

IV. Rule 3.3 Is Not Unconstitutionally Vague as Applied to Bailey

Bailey argued the rule prohibiting "continuous associations with felons" is unconstitutional because it is both vague and overbroad. We conclude that whatever deficiencies may exist hypothetically, the rule is constitutional as applied to the facts of Bailey's case.

All parties concede government may permissibly place limits on a public employee's constitutionally protected rights

which could not be imposed on a private person. (see, e.g., *Unruh v. City Council* (1978) 78 Cal.App.3d 18, 23-24; *Pickering v. Board of Education* (1968) 391 U.S. 563, 565.) Further, the unique position occupied by police officers subjects them to an even higher standard of conduct than other employees. (*Unruh v. City Council, supra*, 78 Cal.App.3d at pp. 24-25; *Kelly v. Johnson* (1976) 425 U.S. 238.) Bailey concedes that a narrowly tailored prohibition enjoining police officers from maintaining close personal relationships with the criminal underside of society would be constitutional. Other courts have recognized such a prohibition validly balances the employee's interest in freely associating against the employer's interests in the efficiency of the public service. (see, e.g., *Dunn v. McKinney* (D.C.Wyo. 1985) 622 F.Supp. 259; *Sponick v. City of Detroit Police Department* (1973) 49 Mich.App. 162, 211 N.W. 2d 674, disapproved on other grounds in *Rinaldi v. Civil Serv. Com'n, City of Livonia* (1976) 69 Mich.App.58, 244 N.W.2d 609.)

The dispute lies rather in whether rule 3.3 is sufficiently specific that it gave Bailey "fair notice" of what conduct was prohibited. Bailey claims the proscription against "continuous associations" is void as impermissibly vague because "men of common intelligence must necessarily guess at its meaning" (*Connally v. General Const. Co.* (1926) 269 U.S. 385, 391), i.e., as to what level of contacts violates the rule. Persons whose conduct is to be regulated should be given reasonably fair warning of what specific conduct must be avoided. Also, laws should contain definable standards so that persons charged with enforcement are precluded from ad hoc, subjective interpretations which can lead to arbitrary enforcement. (*Hoffman Estates v. Flipside, Hoffman Estates* (1982) 455 U.S. 489, 498.) In short, the "root of the vagueness doctrine is a rough idea of fairness." (*Colten v. Kentucky* (1972) 407 U.S. 104, 110.)

A. Vagueness as Applied

The rule, both on its face and as amplified by Sergeant

Darton, is sufficiently specific to give notice to Bailey that maintaining friendships with felons in general, and with Smith specifically, is prohibited. Bailey claims, however, the rule remains vague even as applied to his conduct, because he did not know how much contact he could maintain with Smith without transgressing the rule against continuous associations. In essence, he argues the term "continuous associations" is ". . . so wholly devoid of objective meaning that it provides no standard *at all* . . . [and hence] we cannot determine whether his conduct is clearly proscribed 'hard core' conduct [citation] because [rule 3.3] is so vague it 'has no core.' [citation.]" (*Cranston v. City of Richmond* (1985) 40 Cal.3d 755, 756.)

We recognize that the phrase "continuous associations or dealings" does not set forth a numerical formula for determining the precise number or frequency of permissible contacts, beyond which an association will be found to be "continuous." However, a statute is not rendered vague by the lack of such precision. Even in cases where First Amendment concerns have subjected allegedly imprecise language to stricter scrutiny, the courts do not impose the formulaic precision which Bailey argues is required. To the contrary, the courts have recognized that because we are "[c]ondemned to the use of words, we can never expect mathematical certainty from our language. [While] [t]he words of the [statute] are marked by 'flexibility and reasonable breadth, rather than meticulous specificity' [citation], . . . we think it is clear what the [statute] as a whole prohibits." (*Grayned v. City of Rockford* (1972) 408 U.S. 104, 10.) Although '[t]here might be quibbles about the meaning of [the statutory proscription], . . . there are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest." (*CSC v. Letter Carriers* (1973) 413 U.S. 548, 577-579.)

Rule 3.3 might have ambiguities as applied to hypothetical situations involving borderline conduct; however, it does indeed have a "core" of proscribed conduct (see *Cranston v. City of Richmond, supra*, 40 Cal.3d at pp. 765-769, fn. 12 [holding the term "conduct unbecoming" an officer is not facially vague]). It prohibits ongoing personal relationships with felons. (See also *Sponick v. City of Detroit Police Department, supra*, 49 Mich.App. 162, 211 N.W. 2d 674 [holding rule which proscribed "associating" with known criminals is not void for vagueness because it gives fair warning of proscribed conduct].) The only question is whether Bailey's conduct so clearly fell within the rule's proscription that its application to him was constitutionally permissible. (*Cranston v. City of Richmond, supra*, 40 Cal.3d at 770.)

The rule, on its face and as clarified by Darton's order[6], required Bailey to disassociate himself from Smith. Both the city council and the trial court concluded Bailey continued his association with Smith despite knowledge of the rule and in violation of Darton's order. Bailey's objective conduct and admitted contacts with Smith and Smith's wife, coupled with his own characterization of his relationship with Smith as a friendship (especially in light of his somewhat recalcitrant attitude in accepting Smith's status as a felon, and his belief Smith had already "paid his debt"), amply justified the finding Bailey had not disassociated himself from Smith.

B. Facial Overbreadth - Lack of Standing

Bailey argues rule 3.3 is constitutional and cannot be

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6. Whether a rule gives "fair warning" depends not only upon the wording of the rule itself but also upon the existence of procedures designed to clarify the rule. A rule which contains marginal areas of ambiguity may be corrected by clarification provided by administrative interpretation of the rule. (See, e.g., *CSC v. Letter Carriers, supra*, 413 U.S. at p. 580.) Here, Darton explained Smith was a felon within rule 3.3's proscription, requiring Bailey to disassociate himself from Smith, except as to contacts legally required by contract.

applied to him because it is facially overbroad. As written, Bailey contends the rule could literally apply to a variety of individuals, association with whom by police officers could not or should not be prohibited. For example, Bailey asks, what about the person whose conviction is of ancient vintage and who has been completely rehabilitated? Consider also, Bailey says, the likelihood of some member of a police officer's fraternal organization, church or even political party being a convicted felon. If a member of one's family were to be convicted, Bailey points out, this rule would prohibit familial association.

We reject this position, not because this statute may not in fact be overbroad, but because we find Bailey lacks standing to assert facial overbreadth. "It is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in light of the facts of the case at hand." (*United States v. Mazurie* (1975) 419 U.S. 544, 550.) Further, a person to whose conduct a law clearly applies cannot avoid its penalties merely because the statute may be vague or unconstitutionally overbroad when applied to the conduct of others. (*Hoffman Estates v. Flipside, Hoffman Estates, supra*, 455 U.S. at p. 495; *Broadrick v. Oklahoma* (1983) 413 U.S. 601, 610.)

There exists, however, an exception to this rule which Bailey seeks to invoke. When *First Amendment* concerns are substantially implicated by the challenged statute, the traditional rules of standing are altered to permit attacks on overly broad statutes without requiring the litigant to demonstrate his own conduct could not be regulated by a narrowly drawn statute. (*Id.* at pp. 611-612.) This "narrow exception," which *Broadrick* described as "strong medicine . . . employed . . . sparingly and only as a last resort" (*id.* at p. 613), is rooted in the special solicitude the courts afford to First Amendment values, and reflects the concern that the existence of an overly broad statute directed at activity sheltered by the First Amendment may "chill" protected activity. (See, e.g., *Massachusetts v. Oakes* (1989) 491 U.S. ———, 105 L.Ed.2d 493, 500-501.) However, because the

overbreadth doctrine is "strong medicine," it has been limited to (and not recognized outside of) the First Amendment context. (See *United States v. Salerno* (1987) 481 U.S. 739, 745; *Lutz v. City of Work, Pa.* (3rd Cir. 1990) 899 F.2d 255.) We must therefore determine whether rule 3.3 so substantially regulates activity sheltered by the First Amendment that, although Bailey's close relationship with Smith is one which could be constitutionally prohibited, Bailey may attack rule 3.3 for its facial overbreadth.

Bailey contends rule 3.3 is directed at, and he was in fact engaged in, activity sheltered by the First Amendment, i.e., the "right to associate" with Smith. Hence, Bailey argues, he has standing to challenge the overbreadth of rule 3.3. Certainly, numerous courts have permitted facial overbreadth challenges to rules which regulated an employee's "associational" rights. (See, e.g., *Keyishian v. Board of Regents* (1978) 385 U.S. 589; *United States v. Robel* (1967) 389 U.S. 258.) However, the talismanic incantation of the term "right of association" does not necessarily trigger First Amendment concerns and its attendant special rules permitting "facial overbreadth" challenges. To the contrary, the analysis contained in recent cases demonstrates there are two different forms of "freedom of association" which enjoy constitutional protections, *only one branch of which falls within the ambit of First Amendment.*

"While the First Amendment does not in terms protect a 'right of association,' our cases have recognized that it embraces such a right *in certain circumstances.*" (*Dallas v. Stanglin* (1989) 490 U.S. _____, 104 L.Ed.2d 18, 25, emphasis added.) The court in *Roberts v. United States Jaycees* (1984) 468 U.S. 609 described the constitutionally protected "freedom of association" as having two distinct branches — "intimate associational rights" and "expressive associational rights:"

> "Our decisions have referred to constitutionally protected 'freedom of association' in two distinct senses. In one line of decisions, the Court has concluded that choices to enter into and maintain certain intimate

> human relationships must be secured against undue intrusion by the State. . . . In this respect, freedom of association receives protection *as a fundamental element of personal liberty.* In another set of decisions, the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment — speech, assembly, petition for the redress of grievances, and the exercise of religion. . . . [aa] . . . *[T]he nature and degree of constitutional protection afforded freedom of association may vary depending on the extent to which one or the other aspect of the constitutionally protected liberty is at stake in a given case.*" (*Id.* at pp. 617-618, emphasis added.)

Laws which regulate purely social relationships, at least where the relations regulated lacked a significant "expressive" component, have not been subjected to First Amendment scrutiny. (See, e.g., *Dallas v. Stanglin, supra,* 490 U.S. _____, 104 L.Ed.2d 18, 25-26.) The court in *Hvamstad v. Suhler* (D.Minn. 1989) 727 F.Supp. 511, after examining both the policy underpinnings for the "overbreadth" doctrine and the distinctions drawn between the two branches of associational rights, concluded:

> "Given the limited scope of the overbreadth doctrine and the Supreme Court's analysis of the foundations of the freedom of association, this court concludes that one cannot launch an overbreadth attack based upon the freedom of intimate association . . . The overbreadth doctrine, in its limited state, cannot . . . be extended to encompass intimate association rights that are based not on first amendment concepts, but on general liberty notions." (*Id.* at p. 517.)

In this case rule 3.3 does not on its face single out "expressive" associations for regulation; rather, it is limited to regulating only "intimate" associations. Nor is there any claim that Bailey's association with Smith, which triggered the application of rule 3.3 to Bailey's conduct, had some significant expressive component. Absent these criteria, First

Amendment scrutiny is not applicable to rule 3.3 merely because it could conceivably burden activity sheltered by the First Amendment.[7] (See, *Arcara v. Cloud Books, Inc.* (1986) 478 U.S. 697.)

At most, rule 3.3 regulates conduct whose protection is rooted in Bailey's more generalized "liberty" interests. While a liberty interest is protected, it does not enjoy the special solicitude accorded First Amendment concerns, including benefits of the facial overbreadth doctrine. Rule 3.3 is not overbroad as applied to Bailey's conduct, and he lacks standing to raise the complaint of facial overbreadth.

DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION.

FROEHLICH, J.

WE CONCUR:

HUFFMAN, Acting P.J.

LIM, J.

*Assigned by the Chairperson of the Judicial Council.

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7. To the extent cases such as *Dunn v. McKinney* (D.C. Wyo. 1985) 622 F.Supp. 259 and *Sponick v. City of Detroit Police Department, supra*, 49 Mich.App. 162, 211 N.W. 2d 674 have assumed that rules proscribing police associations with criminals *must* receive facial scrutiny using First Amendment principles, we believe they are of questionable validity and should not be followed.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO

ALAN BAILEY, Petitioner, v. CITY OF NATIONAL CITY, CITY COUNCIL OF THE CITY OF NATIONAL CITY, Respondents.	)	Case No. 609796 JUDGMENT DENYING PETITION FOR PEREMPTORY WRIT OF MANDAMUS DATE: OCT. 19, 1989 TIME: 9:00 a.m. DEPT: 35

The petition for writ of mandamus duly came on for hearing on October 19, 1989, in Department 35 of the above-entitled court, before the Honorable Robert C. Thaxton, Jr., Judge presiding. Everett L. Bobbitt appeared for petitioner; Linda Kaye Harter appeared for respondents. The court having reviewed the transcript and exhibits of the administrative hearing, the pleadings, memoranda and all other documents on file herein and having considered the arguments of counsel, and upon exercise of its independent judgment finds by a preponderance of the evidence:

1. that the Findings made by the City Council of the City of National City in Resolution No. 15,844 were clearly supported by the evidence;

2. that the evidence clearly supports the action of the City Council and the National City Police Department;

3. that therefore there was no abuse of discretion;

4. that National City Police Department Rule 3.3 is constitutional as it was applied in this case.

IT IS HEREBY ORDERED AND ADJUDGED that judgment

be entered in favor of the City and Respondents, and that the petition for peremptory writ of mandamus is denied and respondents shall recover their costs in this action.

Dated: _____ _____

ROBERT C. THAXTON, JR.
JUDGE OF THE SUPERIOR COURT

Approved as to form:

_____

LINDA KAYE HARTER
Assistant City Attorney
Attorney for Respondent

_____

EVERETT L. BOBBITT
Attorney for Petitioner

Fourth Appellate District, Division One, No. D011272
S019672

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

ALAN BAILEY, Appellant

v.

CITY OF NATIONAL CITY Et Al., Respondents

Appellant's petition for review DENIED.

LUCAS

Chief Justice

APPENDIX C